Remington Lodging & Hospitality, LLC, d/b/a The Sheraton Anchorage *and* Unite Here! Local 878, AFL–CIO. Cases 19–CA–032148, 19–CA–032188, 19–CA–032222, 19–CA–032238, 19–CA–032301, 19–CA–032334, 19–CA–032337, 19–CA–032349, 19–CA–032367, 19–CA–032414, 19–CA–032420, 19–CA–032438, 19–CA–032487, 19–CA–032598, 19–CA–032600, and 19–CA–032609

June 18, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On April 24, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 803. The Respondent and the Charging Party each filed a petition for review in the United States Court of Appeals for the Ninth Circuit.[1]

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale it sets forth as modified below. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 95, which we incorporate by reference.[2] The judge's recommended Order, as further modified here, is set forth in full below.[3]

In the now-vacated Decision and Order, a Board majority adopted the judge's findings that the Respondent unlawfully maintained five handbook rules solely on the basis that the Respondent applied those five rules to restrict employees' Section 7 activities. For the reasons given by the judge, we now agree with him that four of those five handbook rules are also unlawful on their face.[4]

[1] The Respondent originally filed its petition for review in the United States Court of Appeals for the District of Columbia Circuit, which transferred that petition to the Ninth Circuit. *Remington Lodging & Hospitality, LLC v. NLRB*, 747 F.3d 903 (D.C. Cir. 2014).

[2] In finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, we agree with the judge that the disaffection petition was tainted by the Respondent's unlawful support of that petition. See *SFO Good-Nite Inn, LLC*, 357 NLRB 79, 79 (2011) ("[A]n employer may not withdraw recognition based on a petition that it unlawfully assisted, supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice."), enfd. 700 F.3d 1 (D.C. Cir. 2012). We need not pass on the judge's additional finding that the Respondent's other unfair labor practices separately tainted the disaffection petition.

We do not rely on the following decisions cited in the now-vacated Decision and Order: *Latino Express*, 359 NLRB 518 (2012); *Sodexo America LLC*, 358 NLRB 668 (2012); *J. W. Marriott Los Angeles at L. A. Live*, 359 NLRB 144 (2012); and *Costco Wholesale Corp.*, 358 NLRB 1100 (2012). We note that *Flex-Frac Logistics, LLC*, 358 NLRB 1131 (2012), cited in the vacated Decision and Order, was reaffirmed by the Board at 360 NLRB 1004 (2014).

In light of *Pressroom Cleaners*, 361 NLRB 643 (2014), Chairman Pearce no longer adheres to the position he articulated in footnote 9 of the now-vacated Decision and Order.

[3] In ordering the tax compensation and Social Security reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014). We have modified the Order and notice to identify all of the unilateral changes for which make-whole relief is required.

The General Counsel's motion to consolidate this case with *Sheraton Anchorage*, 19–CA–032599 et al., is denied. At this time, consolidation neither effectuates the purposes of the Act nor is necessary to avoid unnecessary costs and delays.

[4] Those four handbook rules include (1) the rule confining employees to the area of their job assignment and work duties and barring them from "other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head"; (2) the rule prohibiting distribution of literature in guest areas or work areas, solicitation during working time, or solicitation of guests at any time for any purpose; (3) the rule against having a conflict of interest with the hotel; and (4) the rule against behavior that violates common decency or morality or publicly embarrasses the hotel. There are no exceptions to the judge's finding that the fifth rule, which relates to insubordination or failure to carry out a job assignment, was unlawful only as applied by the Respondent.

Unlike Member Miscimarra, we find that employees would reasonably interpret the rule prohibiting them from having a "conflict of interest" with the Respondent as encompassing activities protected by the Act. Particularly when viewed in the context of the Respondent's other unlawfully overbroad rules, employees would reasonably fear that the rule prohibits any conduct the Respondent may consider to be detrimental to its image or reputation or to present a "conflict" with its interests, such as informational picketing, strikes, or other economic pressure. See, e.g., *First Transit, Inc.*, 360 NLRB 619, 620 fn. 5 (2014) (finding facially unlawful a rule prohibiting employees from participating in "outside activities that are detrimental to the Company's image or reputation, or where a conflict of interest exists"). Moreover, to the extent the rule is ambiguous, the ambiguity "must be construed against the employer as the promulgator of the rule." *Hyundai America Shipping Agency*, 357 NLRB 860, 870 (2011) (citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998)).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Remington Lodging & Hospitality, LLC, d/b/a The Sheraton Anchorage, Anchorage, Alaska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Withdrawing recognition from the Union and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(c) Unilaterally changing the terms and conditions of employment of its unit employees.

(d) Refusing to bargain collectively with the Union by unilaterally implementing collective-bargaining proposals covering terms and conditions of employment of unit employees without fully complying with the requirements of Section 8(d)(3) of the Act at a time when the Union retains the right to be recognized as the exclusive collective-bargaining representative of the unit employees.

(e) Issuing disciplinary warnings to or suspending employees because of their support for and activities on behalf of the Union or for engaging in other protected concerted activity.

(f) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization or for engaging in other protected concerted activity.

(g) Maintaining and/or enforcing a rule in its employee handbook that employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager."

(h) Maintaining and/or enforcing a rule in its employee handbook that employees "must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head."

(i) Maintaining and/or enforcing a rule in its employee handbook that "distribution of any literature, pamphlets, or other material in a guest or work area is prohibited . . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate."

(j) Maintaining and/or enforcing a rule in its employee handbook that employees are prohibited from disclosing confidential information, including "personnel file information" and "labor relations" information, and further providing that when disclosure is required "by judicial or administrative process or order or by other requirements of law," employees must "give ten days' written notice to [Respondent's] legal department prior to disclosure."

(k) Maintaining and/or enforcing a rule in its employee handbook that employees may not "give any information to the news media regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention."

(l) Maintaining and/or enforcing a rule in its employee handbook that a "conflict of interest with the hotel or company is not permitted."

(m) Maintaining and/or enforcing a rule in its employee handbook that prohibits "behavior which violates common decency or morality or publicly embarrasses the hotel or company."

(n) Maintaining and/or enforcing a rule in its employee handbook that prohibits "insubordination or failure to carry out a job assignment or job request of management."

(o) Confiscating union buttons worn or carried by employees.

(p) Soliciting or otherwise coercing employees to sign a petition seeking to decertify the Union as the collective-bargaining representative of the unit employees.

(q) Promising employees favorable treatment if they sign a decertification petition.

(r) Threatening to discharge employees if they refuse to sign a decertification petition.

(s) Coercively interrogating employees regarding their support for the Union.

(t) Denigrating the Union in the eyes of the unit employees by informing them that the Respondent intends to unilaterally implement changes in their terms and conditions of employment without the parties having first reached a good-faith collective-bargaining impasse.

(u) Prematurely declaring an impasse in collective-bargaining negotiations with the Union; and

(v) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All Guest Service Agents, Communication Agents, Guest Service Agent Supervisors, Bell Captains, Bell Persons, Reservation Sales Agents, Door Persons/Drivers, Room Attendants, Inspectors/Floor Supervisors, Linen Room Attendants, Laundry Seamstresses, Maintenance employees, Porters, Storeroom

Clerks, Lead Storeroom Clerks, Receiving Clerks, Maitre D's, Captains, Hosts/Hostesses, Restaurant Cashiers, Bus help, Coat Checkers, Banquet Waithelp, Banquet Housepersons, Banquet Bartenders, Room Service/Restaurant Waiters, Persons, Lead Stewards, Chief Stewards, Stewards, Bartenders/Service, Bartenders Tipped, Bar Backs, Cocktail Waithelp, Sous Chefs, Breakfast/Lunch Cooks, Dinner/Banquet Cooks, Prep Cooks, Pantry Cooks, Pastry Chefs, Lead Bakers, Bakers Helpers, Cafeteria Servers, and Health Club Attendants employed at the Respondent's Sheraton Anchorage facility, excluding all managers, supervisors, and confidential employees, as defined by the Act.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-stated bargaining unit.

(c) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on March 18, 2010, regarding a guest satisfaction incentive plan, and on May 1, 2010, regarding the unit employees' health insurance plan.

(d) Make whole its employees for any losses incurred as a result of its unlawful unilateral changes made in the terms and conditions of their employment, including the increase in the number of rooms cleaned per day, the elimination of a paid lunchbreak, the implementation of a $1 charge for meals, the reduction of paid holidays and sick days, the implementation of the Aetna health plan, the assignment of security duties to engineers, and the implementation of a performance incentive plan, and reimburse the employees for any out-of-pocket medical expenses that the employees were required to pay themselves as a result of no longer being covered by the medical insurance plan provided for in the expired collective-bargaining agreement, plus interest as provided for in the remedy section of the judge's decision, and, as to the October 2009 unilateral changes, as limited in the amended remedy section of the now-vacated Decision and Order, which is incorporated by reference herein.

(e) Within 14 days from the date of this Order, offer Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(f) Within 14 days from the date of this Order, rescind the suspensions and/or written disciplines issued to Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher.

(g) Make Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(h) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges, suspensions, and/or written disciplines of Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher, and within 3 days thereafter, inform them in writing that this has been done and that the discharges, suspensions, and/or written disciplines will not be used against them in any way.

(i) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days from the date of this Order, rescind or revise the overly broad confidentiality rule to remove any language that prohibits or may be read to prohibit employees from discussing wages or other terms and conditions of employment.

(l) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager."

(m) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees "must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head."

(n) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein "distribution of any literature, pamphlets, or other material in a guest or work area is prohibited . . . . Solicitation of guests

by associates at anytime for any purpose is also inappropriate."

(o) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees are prohibited from disclosing confidential information, including "personnel file information" and "labor relations" information, and further providing that when disclosure is required "by judicial or administrative process or order or by other requirements of law," employees must "give ten days written notice to [Respondent's] legal department prior to disclosure."

(p) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein employees may not "give any information to the news media regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention."

(q) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein a "conflict of interest with the hotel or company is not permitted."

(r) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein "behavior which violates common decency or morality or publicly embarrasses the hotel or company" is prohibited.

(s) Within 14 days from the date of this Order, rescind or revise the rule in its employee handbook wherein "insubordination or failure to carry out a job assignment or job request of management" is prohibited.

(t) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

(u) Within 14 days after service by the Region, post at its hotel in Anchorage, Alaska, copies of the attached notice marked "Appendix"[5] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July of 2009; and

(v) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees in both English and Spanish by a high-ranking management official or, at the Respondent's option, by a Board agent in the presence of such an official.

(w) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I agree with the judge's rulings, findings,[1] and conclusions in this multiple-issue case. For the reasons stated in the judge's decision, as supplemented below, I concur with my colleagues' decision to uphold the judge's decision as to most issues, and I respectfully dissent from the majority's finding that the Respondent's handbook rule prohibiting employees from having a "conflict of interest" with the hotel is unlawful on its face.

1. *Unilateral Changes in October 2009.* I agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes to the unit employees' terms and conditions of employment in October 2009.[2] Although the parties had, by then, bargained to impasse over a proposal including such changes, the Respondent failed to prove that the Federal Mediation and Conciliation Service (FMCS) was given notice of the labor dispute at least 30 days before the Respondent made the changes, as required by Section 8(d)(3) of the Act. See *Petroleum Maintenance Co.*, 290 NLRB 462, 462–463 (1988). I find it unnecessary to pass on the continuing validity of Board precedent holding that such notice must be given *by the initiating party* (here, the Respondent) and that timely notice given by the non-

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The Respondent has excepted to some of the judge's credibility findings. I find that there is no basis for reversing the judge's credibility findings under *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[2] In October 2009, the Respondent unilaterally required housekeepers to clean two additional rooms per day, began requiring employees to clock-out for their lunchbreak, and began charging employees $1 for meals that had previously been free of charge.

initiating party is inadequate under Section 8(d)(3). See *Mar-Len Cabinets, Inc.*, 243 NLRB 523 (1979), enf. denied in relevant part 659 F.2d 995 (9th Cir. 1981), on remand 262 NLRB 1398 (1982). Although the record indicates that the Union notified the FMCS of the labor dispute at some unspecified time, the record does not establish that the Union's notice came at least 30 days before the changes at issue. Hence, I concur that the Respondent's October 2009 changes were unlawful. I further agree with the majority that the make-whole relief for this violation must be tolled as of March 5, 2010, i.e., 30 days after the Respondent belatedly filed a notice with the FMCS on February 3, 2010, and I further agree that the Respondent need not rescind those changes. See *Mar-Len Cabinets*, 243 NLRB at 538–539.

2. *Discipline of Nine Employees Who Presented a Boycott Petition*. I adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining nine employees who presented a boycott petition to General Manager Dennis Artiles on November 17, 2009, but solely on procedural grounds. The Respondent failed to specifically except to the judge's finding that the discipline was unlawful. Although it briefly mentioned the discipline when excepting to the judge's separate finding that the disaffection petition was tainted by the Respondent's unfair labor practices, the Respondent did not there offer a sufficiently specific argument for overturning the judge's finding that the discipline was unlawful. Accordingly, I do not pass on the merits of the judge's finding. See Section 102.46(b)(1) of the Board's Rules & Regulations ("Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken").

3. *Suspension and Discharge of Four Employees for Distributing Handbills Under the Hotel's Porte Cochere*. I agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending and thereafter discharging four off-duty employees for distributing boycott handbills under the hotel's porte cochere. I do not agree with the judge's suggestion that the exterior area immediately outside a hotel entrance, such as a porte cochere, is a nonwork area on the ground that the work performed there (such as security, maintenance, and valet parking) is merely "incidental to a hotel's primary function." In my view, whether a particular porte cochere or other hotel entrance is a work area (where distribution may be lawfully prohibited) depends on the factual record, which may vary from case to case. Although the work in these areas may differ from that performed elsewhere in the hotel, in some respects such work may involve a higher level of activity, which may constitute an arriving or departing guest's initial or final experience with the hotel. In the instant case, I find it unnecessary to pass on whether the Respondent's porte cochere is a work area because the Respondent did not suspend or discharge the four employees for distributing literature *in a work area*, but rather because they did so *anywhere on its property*. When confronting two of the handbillers, the Respondent's human resources director, Jamie Fullenkamp, informed them that they were on private property and that they would have to move to the public sidewalk or she would summon the police. Fullenkamp then told the other two handbillers that they were trespassing and must leave. The employees' termination notices state that they were discharged for violating a policy prohibiting employees from "be[ing] on the hotel premises, inside or outside, before or after their scheduled shift, without having acquired written permission from their Department Head." Thus, because the Respondent discharged the four employees in reliance on the prohibition against engaging in protected conduct *anywhere* on Respondent's premises, "inside or outside," it is immaterial whether the porte cochere here is considered a work area.

4. *The Handbook Rule Against Behavior that Violates Common Decency or Morality or Publicly Embarrasses the Respondent.* The Respondent maintains a handbook rule providing: "I understand that I may be discharged without any prior warning if I commit any of the following acts . . . . Behavior which violates common decency or morality or publicly embarrasses the Hotel or Company." I agree with my colleagues that the rule is unlawful on its face to the extent that it prohibits behavior that "publicly embarrasses" the Respondent.[3] On its face, that portion of the rule subjects an employee to discharge without warning based on *any* type of behavior that is "publicly embarrassing" to the Respondent. Of course, a central aspect of the Act is the right of employees to en-

[3] Contrary to the judge, I would not find that the rule is facially unlawful to the extent that it prohibits behavior that violates "common decency" or "morality." I believe employees generally understand what types of misconduct violate "common decency" and "morality," and a reader does not need examples to understand that NLRA-protected conduct would not fall within this type of prohibition. See *Albertsons, Inc.*, 351 NLRB 254, 258 fn. 18 (2007) (finding lawful two rules prohibiting "[o]ff-the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity" and "[a]ny other misconduct which, in the Company's judgment, warrants immediate discharge"); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1284 fn. 2, 1292–1293 (2001) (finding lawful a rule prohibiting "any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company, or its guests"), enfd. in part, remanded on other grounds 334 F.3d 99 (D.C. Cir. 2003), on remand 343 NLRB 1281 (2004); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999) (finding lawful a rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel").

gage in "concerted" actions that publicize particular labor disputes and, potentially, cause public embarrassment to the employer. For example, handbilling to inform customers that an employer pays substandard wages and benefits is quintessential Section 7 activity. Employees engaged in such activity intend to publicly embarrass an employer as a means to gain an advantage in negotiations or to otherwise secure employer concessions. Thus, the Respondent's prohibition of any activities that cause public embarrassment goes directly to a central aspect of the Act's protection. For these reasons, I join my colleagues in finding that this aspect of the rule is facially unlawful.

5. *The Handbook Rule Against Employees Having a Conflict of Interest.* The Respondent maintains a handbook rule providing: "I understand that conflict of interest with the hotel or company is not permitted." The Respondent cited that rule in disciplinary notices that it issued to the nine employees who presented the boycott petition to General Manager Artiles in November 2009, asserting that the employees had violated that policy. In the absence of any exception to the judge's finding that the nine employees were engaged in Section 7 activity when they presented the petition, I agree with the majority that the Respondent violated Section 8(a)(1) of the Act when it applied the rule against conflicts of interest to restrict employees' Section 7 activity.

However, I disagree with my colleagues' additional finding that the rule against conflicts of interest is unlawful on its face. Employers have a legitimate interest in preventing employees from maintaining a conflict of interest, whether they compete directly against the employer, exploit sensitive employer information for personal gain, or have a fiduciary interest that runs counter to the employer's enterprise. Therefore, even if one applies *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004),[4] I do not agree with my colleagues' conclusion that employees would reasonably understand the conflict-of-interest rule as one that extends to employees' efforts to unionize or improve their terms or conditions of employment. In my view, the rule, on its face, does not reasonably suggest that efforts to unionize or improve terms and conditions of employment are prohibited. Cf. *Tradesmen International*, 338 NLRB 460, 460–461 (2002) (finding facially lawful a "conflicts of interest" rule prohibiting "disloyal, disruptive, competitive, or damaging" conduct and requiring employees to "represent the company in a positive and ethical manner").[5] I also note that the challenged rule is immediately adjacent to a rule stating: "I understand that it is against company policy to have an economic, social or family relationship with someone that I supervise or who supervises me and I agree to report such relationships." This context bolsters my conclusion that the Respondent's rule merely conveys a prohibition on truly disabling conflicts and not a restriction on activities protected by the Act.[6]

6. *The Withdrawal of Recognition*. I agree with my colleagues' finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on June 2, 2010, in the absence of untainted evidence that the Union had lost majority support. I do not agree with Board precedent to the extent it holds that any unlawful employer support of a disaffection petition gives rise to an *irrebuttable* presumption that the petition is tainted and cannot establish loss of majority support. See *SFO Good-Nite Inn, LLC*, 357 NLRB 79 (2011), 700 F.3d 1 (D.C. Cir. 2012). I agree with the position articulated in the separate opinion of former Member Hayes in *SFO Good-Nite Inn*. Like him, I think that the "presumption of taint should be rebuttable rather than irrebuttable, thereby raising the possibility in future cases that the representational desires of a majority of employees unaffected by, or possibly even unaware of, unlawful employer involvement can be honored." Id. slip op. at 5 (Member Hayes, concurring in part and dissenting in part). I concur in finding the violation in this case because the Respondent has not rebutted the presumption of taint. The Respondent did not show that at least 81 signers of the disaffection petition (i.e., a majority of the 161-member unit) were unaware of, or unaffected by, the Respondent's unlawful assistance.

[4] As I explained in my partial dissenting opinion in *Triple Play Sports Bar & Grille*, 361 NLRB 308, 317 fn. 3 (2014), I do not agree with the current Board standard regarding alleged overly broad rules and policies, which is set forth as the first prong of *Lutheran Heritage* (finding rules and policies unlawful, even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity, where "employees would reasonably construe the language to prohibit Section 7 activity"). I would reexamine this standard in an appropriate future case.

[5] The majority cites *First Transit, Inc.*, 360 NLRB 619, 620 fn. 5 (2014), in support of its finding that the Respondent's rule against having a conflict of interest is unlawful on its face. I find *First Transit* to be distinguishable because the rule there, unlike the rule here, did not simply prohibit having a conflict of interest. Rather, the *First Transit* rule linked having a conflict of interest with participating "in outside activities that are detrimental to the company's image or reputation." Additionally, the *First Transit* rule, unlike the rule here, was not adjacent to a rule indicating that a conflict of interest was limited to a truly disabling conflict. Finally, and in any event, I agree with Member Johnson's dissenting footnote in *First Transit*. Id.

[6] To remedy the as-applied violation, I would order the Respondent to cease and desist from applying the rule to restrict Sec. 7 activity and to post an appropriate notice. I would not order the Respondent to rescind a facially lawful rule. See *Piedmont Gardens*, 360 NLRB 813, 813 fn. 4 (2014).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with UNITE HERE!, Local 878, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT withdraw recognition from the Union and fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

WE WILL NOT unilaterally change the terms and conditions of employment of our unit employees.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally implementing and giving effect to collective-bargaining proposals covering terms and conditions of employment of unit employees without fully complying with the requirements of Section 8(d)(3) of the Act at a time when the Union retains the right to be recognized as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT issue disciplinary warnings or suspend you because of your support for and activities on behalf of the Union or for engaging in other protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization or for engaging in other protected concerted activity.

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager."

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees "must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head."

WE WILL NOT maintain and/or enforce a rule in our employee handbook that "distribution of any literature, pamphlets, or other material in a guest or work area is prohibited . . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate."

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees are prohibited from disclosing confidential information, including "personnel file information" and "labor relations" information, and further providing that when disclosure is required "by judicial or administrative process or order or by other requirements of law," employees must "give ten days' written notice to [our] legal department prior to disclosure."

WE WILL NOT maintain and/or enforce a rule in our employee handbook that employees may not "give any information to the news media regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention."

WE WILL NOT maintain and/or enforce a rule in our employee handbook that a "conflict of interest with the hotel or company is not permitted."

WE WILL NOT maintain and/or enforce a rule in our employee handbook that prohibits "behavior which violates common decency or morality or publicly embarrasses the hotel or company."

WE WILL NOT maintain and/or enforce a rule in our employee handbook that prohibits "insubordination or failure to carry out a job assignment or job request of management."

WE WILL NOT confiscate union buttons worn or carried by you.

WE WILL NOT solicit or otherwise coerce you to sign a petition seeking to decertify the Union as your collective-bargaining representative.

WE WILL NOT promise you favorable treatment if you sign a decertification petition.

WE WILL NOT threaten to discharge you for refusing to sign a decertification petition.

WE WILL NOT coercively interrogate you regarding your support for the Union.

WE WILL NOT denigrate the Union by informing you that we intend to unilaterally implement changes in unit employees' terms and conditions of employment without having first reached a good-faith collective-bargaining impasse with the Union.

WE WILL NOT prematurely declare an impasse in collective-bargaining negotiations with the Union; and

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All Guest Service Agents, Communication Agents, Guest Service Agent Supervisors, Bell Captains, Bell Persons, Reservation Sales Agents, Door Persons/Drivers, Room Attendants, Inspectors/Floor Supervisors, Linen Room Attendants, Laundry Seamstresses, Maintenance employees, Porters, Storeroom Clerks, Lead Storeroom Clerks, Receiving Clerks, Maitre D's, Captains, Hosts/Hostesses, Restaurant Cashiers, Bus help, Coat Checkers, Banquet Waithelp, Banquet Housepersons, Banquet Bartenders, Room Service/Restaurant Waiters, Persons, Lead Stewards, Chief Stewards, Stewards, Bartenders/Service, Bartenders Tipped, Bar Backs, Cocktail Waithelp, Sous Chefs, Breakfast/Lunch Cooks, Dinner/Banquet Cooks, Prep Cooks, Pantry Cooks, Pastry Chefs, Lead Bakers, Bakers Helpers, Cafeteria Servers, and Health Club Attendants employed at the Respondent's Sheraton Anchorage facility, excluding all managers, supervisors, and confidential employees, as defined by the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment of our unit employees that we unilaterally implemented on March 18, 2010, regarding a guest satisfaction incentive plan and on May 1, 2010, regarding the unit employees' health insurance plan.

WE WILL make whole employees for any losses incurred as a result of the unilateral changes we unlawfully made in the terms and conditions of your employment, including the increase in the number of rooms cleaned per day, the elimination of a paid lunchbreak, the implementation of a $1 charge for meals, the reduction of paid holidays and sick days, the implementation of the Aetna health plan, the assignment of security duties to engineers, and the implementation of a performance incentive plan, and WE WILL also reimburse employees for any out-of-pocket medical expenses that employees were required to pay as a result of no longer being covered by the medical insurance plan provided for in the expired collective-bargaining agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Gina Tubman, Joanna Littau, Lucy Dudek, and Troy Prichacharn full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, rescind the suspensions and/or written disciplines issued to Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher.

WE WILL make Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher whole for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges, suspensions, and/or written disciplines of Gina Tubman, Joanna Littau, Anna Rodriguez, Maria Hernandez, Lucy Dudek, Su Ran Pak, Troy Prichacharn, Juanita Bourgeois, and Joey Pitcher, and WE WILL, within 3 days thereafter, inform them in writing that this has been done and that the discharges, suspensions, and/or written disciplines will not be used against them in any way.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the overly broad confidentiality rule to remove any language that prohibits or may be read to prohibit employees from discussing wages or other terms and conditions of employment.

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein employees "agree not to return to the hotel before or after [their] working hours without authorization from [their] manager."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein employees "must confine their presence in the hotel to the area of their job assignment and work duties. It is not permissible to roam the property at will or visit other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein "distribution of any literature, pamphlets, or other material in a guest or work area is prohibited . . . . Solicitation of guests by associates at anytime for any purpose is also inappropriate."

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein employees are prohibited from disclosing confidential information, including "personnel file information" and "labor relations" information, and further providing that when disclosure is required "by judicial or administrative process or order or by other requirements of law," employees must "give ten days written notice to [Respondent's] legal department prior to disclosure."

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WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein "behavior which violates common decency or morality or publicly embarrasses the hotel or company" is prohibited.

WE WILL, within 14 days from the date of the Board's Order, rescind or revise the rule in our employee handbook wherein "insubordination or failure to carry out a job assignment or job request of management" is prohibited.

WE WILL furnish all current employees with inserts for the current edition of the employee handbook that (1) advise that the unlawful rules, above, have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful provisions, or (2) provides the language of lawful rules.

REMINGTON LODGING & HOSPITALITY, LLC, D/B/A THE SHERATON ANCHORAGE

The Board's decision can be found at www.nlrb.gov/case/19-CA-032148 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.